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No. 96-2031

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF NEW ORLEANS, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Secretary of Labor's decision requiring the State of Louisiana to repay certain federal grant funds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 108 F.3d 614. The decision of the Secretary of Labor denying discretionary review (Pet. App. 18a-21a) and the decision and order of the administrative law judge (Pet. App. 22a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1997. The petition for a writ of certiorari was filed on June 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, the State of Louisiana entered into an agreement with the Secretary of Labor to become a grant recipient under the Job Training Partnership Act (JTPA), 29 U.S.C. 1501-1781 (1982).[1] Pet. App. 2a. The State disbursed federal grant funds to subgrantees within the State, including petitioner City of New Orleans, which then contracted with various service providers to provide job training to eligible individuals. *Ibid.*; see generally 29 U.S.C. 1501, 1511, 1514(b)(1), 1517 (1982). Under the JTPA, each state recipient is liable to repay to the United States any grant funds not expended in accordance with federal law, and subgrantees are responsible to the State for the grant funds they receive. 29 U.S.C. 1574(d) and (e) (1982); 20 C.F.R. 629.44(d)(1) (1986); see also Pet. App. 2a n.2.[2]

This case concerns three "fixed-unit-price" job training contracts awarded by petitioner: a $142,665 contract with the New Orleans Client Center (NOCC) in the 1985 program year, and contracts with Technical Training Designs, Inc. (TTD) for $798,630 and $280,420 during the 1986 and 1987 program years. Pet. App. 3a-4a & n.5. In such a contract, the service provider receives a fixed "unit price," agreed in ad-

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[1] References to the JTPA in this brief are generally to the original version of the Act, codified at 29 U.S.C. 1501 *et seq.* (1982), which was in effect during the period in which the disputed costs were incurred (June 1986 through October 1988). See Pet. App. 23a n.1.

[2] References to the JTPA regulations are generally to the 1986 edition of the Code of Federal Regulations, which was current during the first program year at issue. The applicable regulations were promulgated in 1983, 48 Fed. Reg. 11,076, and remained unchanged throughout the relevant period.

vance, for each individual who successfully completes training and obtains appropriate employment. See 20 C.F.R. 629.38(e)(2) (1986). This type of contract differs from a cost reimbursement contract, which compensates a service provider on the basis of the reasonable costs actually incurred in operating a training program, without regard to the success of its students. Pet. App. 3a n.4.

An audit of petitioner's JTPA program during the relevant period revealed both recordkeeping and procurement deficiencies. Based on that audit, the responsible Grant Officer at the Department of Labor found that NOCC and TTD (i) failed to keep financial records that were sufficient to ensure that federal funds had been spent lawfully, in violation of Section 165(a)(1) of JTPA, 29 U.S.C. 1575(a)(1) (1982), and 20 C.F.R. 629.35(a) (1986) (Pet. App. 29a, 40a-41a) and (ii) failed to consider cost-effectiveness when it entered into the three fixed unit price training contracts, in violation of Section 107(a) of JTPA, 29 U.S.C. 1517(a) (1982) (Pet. App. 35a-36a, 44a-45a). The Grant Officer disallowed total grant costs of $894,615, including $101,442 paid to NOCC and $793,173 paid to TTD. Pet. App. 5a & n.8, 26a-27a.

After a hearing, an administrative law judge (ALJ) upheld the Grant Officer's determination and ordered the State to repay the disallowed costs. Pet. App. 22a-49a. The ALJ rejected the State's argument that fixed unit price contracts were exempt from the JTPA's recordkeeping requirements, and he found that neither contractor had maintained adequate financial records. *Id.* at 29a-32a, 40a-42a) With respect to procurement procedures, the ALJ found no persuasive evidence that petitioner had considered cost before it awarded the three contracts at issue. *Id.* at

36a-40a, 44a-47a. The Secretary declined further review, and the ALJ's decision therefore became the Secretary's final decision under 29 U.S.C. 1576(b) (1988). Pet. App. 18a-19a.

2. The court of appeals affirmed. Pet. App. 1a-17a. After permitting petitioner to intervene in the State's petition for review of the Secretary's decision (see *id.* at 6a), the court held that petitioner, NOCC and TTD had disregarded their recordkeeping obligations with "reckless abandon." *Id.* at 9a. The court rejected the State's argument that the JTPA's recordkeeping requirements do not apply to fixed-unit-price contracts, and it found substantial evidence to support the Secretary's conclusion that the State had violated those requirements by "utterly fail[ing] to maintain accurate and reliable financial records." *Id.* at 9a-10a.

The court found substantial evidence to support the Secretary's conclusion that petitioner had violated the JTPA by awarding contracts to NOCC and TTD without any consideration of cost-effectiveness. Pet. App. 11a-16a. The court held that compliance with 29 U.S.C. 1514(b)(5) (1982), which required grant recipients to consider past performance, fiscal accountability, and ability to meet performance standards when selecting service providers, and 29 U.S.C. 1517(a) (1982), which specifically required consideration of "cost" in assessing the effectiveness of prospective service providers, was necessary to ensure that all costs allocated to a grant were allowable under the JTPA. Pet. App. 11a-12a & n.17.

The court of appeals specifically rejected the State's argument that "the Secretary violated principles of due process by retroactively applying federal regulations concerning procurement procedures that

were not enacted until years after the contracts in question were executed." Pet. App. 12a n.18 (citing 29 U.S.C. 1574(a)(3)(C) and (D) (1994) and 20 C.F.R. 627.420(e) (1996)). Because the Secretary "based [her] final decision on statutes and regulations in effect at the time the contracts were executed," her determination "[did] not constitute a retroactive application of the JTPA." Pet. App. 12a-13a n.18 (citing 29 U.S.C. 1517(a) (1982) and 20 C.F.R. 629.37(a) (1986)).

ARGUMENT

1. The recordkeeping provisions of the JTPA in effect during this period required recipients of grant funds to "keep records that are sufficient to permit the preparation of reports required by this chapter and to permit the tracing of funds to a level of expenditure adequate to insure that the funds have not been spent unlawfully." 29 U.S.C. 1575(a)(1) (1982). The Department of Labor's implementing regulations reiterated that requirement. 20 C.F.R. 629.35(a) (1986). Yet, the auditors who examined petitioner's contracts with NOCC and TTD were able to trace or reconstruct only a small portion of the expenditures relating to the three contracts in question. See Pet. App. 29a, 41a.[3] The payments so justified were allowed by the Secretary. *Ibid.* The remainder were disallowed because the State, petitioner, and the two contractors never documented how the money was spent, despite ample opportunities to do so in response to the audit report or to the Grant

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[3] The Secretary disallowed $101,442 of the $142,665 paid to NOCC and $793,173 of the $1,079,050 paid to TTD. See Pet. App. 4a n.5, 5a n.8.

Officer's initial and final determinations, or before the ALJ. See Pet. App. 4a-6a, 31a-32a & n.12.

Similarly, the statutory provision in effect throughout the relevant period concerning selection of service providers made clear that "[t]he primary consideration in selecting agencies or organizations to deliver services within a service delivery area shall be the effectiveness of the agency or organization in delivering comparable or related services based on demonstrated performance, in terms of the likelihood of meeting performance goals, *cost*, quality of training, and characteristics of participants." 29 U.S.C. 1517(a) (1982) (emphasis added); see also 29 U.S.C. 1514(b)(5) (1982) (requiring the adoption of "procedures, consistent with section 1517 of this title, for selecting service providers which take into account * * * fiscal accountability"). Although, as the ALJ acknowledged, the JTPA at the time did not require grantees "to perform a written cost analysis or engage in competitive procurement when awarding a contract," (footnote omitted) it did require some demonstration that petitioner had "considered and determined that the contract was based on a fair and reasonable price." Pet. App. 38a; *id.* at 46a. The ALJ found that the record before him did not substantiate even that minimal degree of consideration. *Id.* at 34a-40a, 44a-47a.[4]

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[4] The NOCC proposal, for example, did not contain any budget or cost information to support its proposed cost per trainee, and petitioner's review committee left its evaluation form on the NOCC proposal blank. Pet. App. 36a-37a. The 1986 TTD proposal likewise contained no budget information, and petitioner produced no documentation at all of its consideration of the 1987 TTD proposal. *Id.* at 45a. TTD pro-

After thoroughly reviewing the record (Pet. App. 2a-6a, 8a-15a), the court of appeals concluded (*id.* at 16a) that the Secretary's decision was based on substantial evidence, and indeed that petitioner and its contractors had "dishonor[ed] and disserve[d] the public trust" by "cavalierly disregard[ing] the accounting requirements and procurement procedures specified by the JTPA and the accompanying regulations." Petitioner's attempt to revisit those fact-bound determinations under superseded legal provisions (see Pet. 18-19) does not warrant further review.

2. Petitioner argues (Pet. 13-21) that the Secretary's decision in this case rested on impermissible retroactive application of new statutory or regulatory standards relating to contract procurement. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The court of appeals specifically rejected that argument. Pet. App. 12a n.18. As the court recognized (*ibid.*), "the Secretary based the final decision on statutes and regulations in effect at the time the contracts were executed," not on the more detailed requirements that were later adopted. See *id.* at 29a-31a & n.11, 38a & n.17, 41a-42a, 46a.[5] The court below is the only court of appeals that has addressed the application of the JTPA in analogous circumstances. See *Mississippi Dep't of Econ. & Community Dev.* v. *United States Dep't of Labor*, 90 F.3d 110 (5th Cir.

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vided the same training in 1988 for $150 less per trainee than in 1986 and 1987. *Id.* at 44a.

[5] The Secretary has never purported to adopt retroactive rules or policies under the JTPA. See, *e.g.*, *Jobs, Training & Servs., Inc.* v. *East Texas Council of Gov'ts*, 50 F.3d 1318, 1323 (5th Cir. 1995).

1996) (rejecting similar retroactivity arguments). In any event, petitioner does not argue that the JTPA recordkeeping provisions, on which the Secretary and the court of appeals also relied, were applied retroactively, and that ground alone is sufficient to support the decision below.

3. Finally, we note that on August 5, 1997, the State of Louisiana, which was a party below but which has not joined in petitioning this Court, transmitted to the Department a check in the amount of $894,615, "presented in satisfaction of the judgment" below. The transmittal letter notes that "[t]he enclosed payment * * * will bring a close to" this case. Even if we assume that petitioner, which intervened in the court below (Pet. App. 6a), retains standing to litigate this matter on its own behalf, the evident decision by the State—which is the only party with whom the Secretary ever entered into an agreement with respect to JTPA funds (see *id.* at 2a)—not to pursue the matter argues persuasively against the need for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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